90-787

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

F. L. FARR,
PETITIONER

VS

FEDERAL DEPOSIT INSURANCE
CORPORATION, ET AL.
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

WALTER W. LEONARD
1300 Summit Ave., Suite 504
Fort Worth, TX 76102
(817) 335-6538
ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

Does the Summary Opinion of the Court of Appeals in this case violate Due Process requirements of the Fifth Amendment through its lack of specificity, unreasoned explanations and clearly erroneous conclusions?

TABLE OF AUTHORITIES

CASES

STATUTES

STATE

FEDERAL

F.R.A.P. 47.6 (5th Cir. Local Rules)

F.R.C.P. 52(a)

Title 28, U.S.C. §1254(1)

Title 28, U.S.C. §1819

12 U.S.C. §191 (1988)

12 U.S.C. §1821(c) (1988)

12 U.S.C. §1819(fourth) (1988)

UNITED STATES CONSTITUTION

Amendment V

NOTE

41 Albany L.Rev. 813, 829 (1977)

63 S.Cal.L. Rev 225 (1988)

63 Cornell L.Rev. 128-139 (1977)

52 St. John's L.Rev. 68, 80-81 (1977)

OTHERS

Gardner, James N. Ninth Circuit's Unpublished Opinions: Denial of Equal Justice? 61 A.B.A.J. 1224, 1229 (1975)

Jacobstein, Some Reflections on the Control of the Publication of Appellate Court Opinions, 27 Stan.L.Rev. 791, 797 (1975)

Robel, The Myth of the Disposable Opinion: Unpublished Opinions and Governent Litigants in the United States Court of Appeals, 87 Mich.L.Rev. 940 (1989)

Shuchman v. Galford, The Use of Local Rule 21, in the Fifth Circuit: Can Judges Select Case of "No Precedentai Value? 29 Emory L. Jour. 19 (1980)

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Petitioner, F. L. Farr, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit upholding a Partial Summary Judgment, and Motion to Dismiss and Refusal to Reconsider of the Trial Court when the insufficiency of the opinion precludes due process by its inadequacy which precludes proper review or explanation of decisions reversing rights under State Laws and various clearly erroneous findings.

OPINIONS BELOW

All opinions and rulings in this matter are unpublished. The Opinion of the Court of Appeals appears below as Appendix A. The Order of the Trial Court granting partial Summary Judgment and partial Leave to Amend appears as Appendix B, below. The Order of the Trial Court denying the Motion to Reconsider and granting the Motion to Dismiss appears at Appendix C, below.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on May 25, 1990. A timely Petition for Rehearing was filed on June 15, 1990, following the grant of an extension of time to file. The Court of Appeals denial of the Petition for Rehearing was issued on June 26, 1990, and is set forth in Appendix D. This Court's jurisdiction is invoked under Title 28, U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in Appendix E.

STATEMENT OF THE CASE

The United States District Court, Northern District of Texas, Fort Worth Division, had jurisdiction pursuant to Title 28 U.S.C. §1819 (forth).

In late December, 1969, Appellant entered into a Safe Deposit Box Rental Contract with Appellee's predecessor Bank. (See attached Petitioner's Lodging, p. 1). Soon thereafter, shortly before leaving the County for Southeast Asia, Appellant deposited a large number of coins, many gold and silver (for a list of which see Petitioner's Lodging pp. 2-3). Appellant went to Southeast Asia and subsequently moved to Montreal, later becoming the President of General Dynamics of Canada. On

May 22, 1980, Appellant came to the Bank and asked to see his box and was told that it had been drilled for nonpayment of rent in 1979. At that time Appellant was shown bank records indicating the last authorized entry into the box was in 1969. Appellant was told by Bank officers that, upon opening, it was decided to hold the box and its contents, and the box and its contents were stored in a teller locker. Appellant paid the charges and was given the box in the presence of Bank officers. At that time Appellant saw that the coins in the box were not those left by him - in fact there were coins dated <u>after</u> 1969. An immediate inventory of May, 1980 was made and appears at Petitioner's Lodging pp. 2-3. All the gold and silver coins were gone. Appellant requested an explanation and the Bank officers were able to give none. (q.v. generally, Petitioner's Lodging pp. 4-7,

9-11). Appellant told the Bank that he could not give them a specific list of the missing coins but indicated he would obtain a copy from home (such document is the list above). He generally indicated the extent of the loss. The Bank then told Appellant that there might have been some mistake and that they would search for Mr. Farr's box and its contents elsewhere. Upon this note, Mr. Farr left in order to return home and get a full list of the loss - which was furnished to the Bank. Appellant subsequently contacted the Bank many times but no coins were found, (e.g. see Petitioner's Lodging, pp. 9-16).

In addition to the seizure of control of the box and its contents in 1979, the Bank also had control of the box at other times. In the 1970's Mr. Farr had collateralized several loans with these coins (Petitioner's Lodging, p. 8) and the Bank not only restricted access to the coins

but a Bank officer even kept a full set of keys to the box (Petitioner's Lodging, p. 17). Thus, the Bank at several times has had full access and control of the contents of the Box. After attempting for some time to obtain redress from the Bank, Appellant ultimately filed suit in State District Court in Tarrant County, Texas.

This lawsuit was originally filed by Plaintiff/Appellant F. L. Farr, against Republicbank Fort Worth East, N.A. which later became First Republicbank Fort Worth, N.A. in the 141st Judicial District Court, Tarrant County, Texas. On July 29, 1988, the Comptroller of the Currency declared RepublicBank insolvent pursuant to 12 U.S.C. §191 (1988). On that same date, the Federal Deposit Insurance Corporation (FDIC) was appointed as Receiver for Republic pursuant to 12 U.S.C. §1821(c) (1988). On August 26, 1988, the FDIC removed this action to this

Court, pursuant to 12 U.S.C. §1819 (Fourth) (1988). On March 24, 1989, the FDIC filed its Motion for Summary Judgment herein, seeking judgment against Farr on all claims at issue in this case. While the Motion for Summary Judgment was pending, on April 24, 1989, Farr filed his Motion for Leave to Amend Pleadings. The proposed amendment sought to add a claim under Tex. Prop. Code Ann. §73.003, to the conversion, breach of contract, and strict liability claims already pled. On May 16, 1989, the FDIC filed its Brief in Opposition to Motion for Leave to Amend. By an Order signed September 22, 1989, the Court granted the FDIC's Motion for Summary Judgment in all respects, but granted Farr leave to amend his Complaint herein to contain one cause of action under §73.003 of the Texas Property Code.

On or about September 29, 1989, Farr

filed his Third Amended Complaint alleging a cause of action under §73.003. On October 5, 1989, Farr filed his Motion to Reconsider and Motion for New Trial with reference to the Partial Summary Judgment of September 22, 1989, and order limiting repleading. On October 10, 1989, the FDIC filed its Motion to Dismiss the remaining cause of action under the new pleadings. On December 6, 1989, the Trial Court entered an order denying Plaintiff's Motion to Reconsider and Motion for New Trial and granting the FDIC's Motion to Dismiss. On January 3, 1990, Plaintiff/Appellant filed a Notice of Appeal and on January 10, 1990, the Record was mailed to the United States Court of Appeals (5th Circuit). On May 25, 1990, the United States Court of Appeals (5th Circuit) issued an unpublished summary opinion, per Curiam, affirming the Trial Court. A timely Motion for Rehearing was filed and such was denied

on June 28, 1990. A timely Writ of Certiorari requesting review of such rulings is hereby brought before the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

While it is generally no error for cases to be dealt with by summary opinion, Due Process under the United States Constitution requires more than just conformance with technical requirements. U.S. Constitution, Amend. V; Holloway v. Walter; 790 F.2d 1170 (5th Cir., 1986). Due Process is a flexible standard and must be analyzed on the basis of the particular situation. Matthews v. Eldridge; 424 U.S. 319 (1976). Once we have invoked a Due Process analysis, we must, therefore, examine the fundamental fairness of the particular situation. Morrissey v. Brewer; 408 U.S. 471 (1972).

Since 1976, every federal appellate court has adopted rules that limit the publication of opinions and, as a result, most circuits publish less than half their decisions on the merits. See good discussion - Robel, "The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Court of Appeals," 87 Mich.L.Rev. 940 (1989). While there are many obvious reasons for non-published and summary opinions in terms of judicial economy, it is equally obvious that these opinions could lead to difficulties for litigants. Obviously, summary opinions and unpublished opinions make it very difficult to know how and why the Court has done something. For obvious reasons, most unpublished opinions, as in our case, are of a summary nature. This is especially true in the Fifth Circuit, but is less so in some others.

Shuchman v. Galfard, "The Use of Local Rule 21, in the Fifth Circuit: Can Judges Select Cases of "No Precedental Value?" 29 Emory L. Jour. 195 (1980); 87 Mich.L.Rev. at 943; James N. Gardner, "Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?" 61 A.B.A.J. 1224, 1229 (1975).

The single most obvious problem to litigants presented with a summary opinion is that they can be at a loss to understand what has happened and how they should proceed if they wish further review of the case. An opinion which does not explain itself or does not adequately explain itself can frustrate their undoubted right to seek review of the decision. Obviously, unclear or insufficiently reasoned opinions can operate to render review either unreasonably difficult or impossible and, as such, be a denial of Due Process. 61 A.B.A.J. at 1225. The problem has been reached by the United

States Supreme Court. E.g. Taylor v. McKeithen, 407 U.S. 191 (1971); California v. Krivda, 409 U.S. 33 (1972); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427 (1973); see also Jacobstein, "Some Reflections on the Control of the Publication of Appellate Court Opinions, 27 Stan.L.Rev. 791, 797 (1975); Note: 41 Albany L.Rev. 813, 829 (1977).

"The common thread of these cases was the inadequacy of the opinion of the Court of Appeals in informing the reviewing Court of the precise nature of the litigation and we have not had the benefit of the insight of the Court of Appeals. . ." 407 U.S. at 194. In a similar situation the Supreme Court of Florida quoted the rationale of this Court in an analogous situation and stated:

> ". . . it is equally important that ambiguous or obscure adjudiciations by state courts do

> not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertain whether or not our jurisdiction should be involved. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed." Rosenthal v. Scott, 131 So.2d 480, 482 (Fla. 1961); quoting,

State of Minnesota v. National Tea Co., 309 U.S. 551 (1940). As will be shown below, the opinion of the Court of Appeals in this case is inadequate under the standards enunciated above.

Another problem germane to our situation, and noted by courts and commentators, concerns the problems associated with particular groups of litigants and summary/unpublished

opinions. As discussed in Professor Robel's article, cited above, those who routinely represent government agencies, as here, have an advantage in being able to constantly monitor the progress of similar cases through the system and can fine-tune their arguments in order to "key" issues to matters considered routine by the opinion selection committees and to, thus, have a much greater opportunity to have cases given summary handling and, thus, diminish the process afforded opposing litigants. In this case, for example, although the Trial Court made no decision based upon it, the FDIC appended a fairly extensive discussion on D'Oench, Duhme & Co. v. FDIC, [315 U.S. 447(1942] to its back. Although Appellant objected to this collateral issue being raised and asked, if it were to be an issue, for the opportunity to brief, we find D'Oench duly and cryptically cited as a

grounds for affirmance - even though it was not a basis of decision and was discussed under protest. The nature of a Due Process analysis, as here, requires us to closely scrutinize the circumstances. Here, where a troubled federal agency (the FDIC cannot be characterized as aught else) has constant access to concerns and decisions of the court not generally available to others and where issues "pop up" as grounds of decision, must we not be suspicious on due process grounds when the opinion is as cryptic and unhelpful as this one? Clearly we must and a writ should issue for review.

Unfortunately for Mr. Farr, the Fifth Circuit may well be the most aggressive circuit with regards to the issue of summary and unpublished opinions. See excellent Note: 63 Cornell L.Rev. 128 (1977). The two historically busiest circuits (5th and 9th)

have developed disparate standards for review and the other circuits have clustered themselves at different locations on the spectrum. 63 Cornell L.Rev. 129-139. As a result litigants are merely more or less likely to have cases with unreviewable opinions depending on where they either choose or must litigate their cases. In a due process context this situation is clearly disturbing and our situation seems to be an example where it has gone awry. Although the Court of Appeals did write a summary opinion affirming the Trial Court, the opinion itself is either incomprehensible or clearly wrong. Not only this, but as will be shown below, it sustained the reversal of a principle of Texas case law without explanation. This would seem to give it precedental value under either rule relating to publication or summary opinions. FRAP 47.6 (5th Cir. Local Rules).

As is also to be shown in the point by point analysis below, the Court's affirmance is also reviewable since it is "clearly erroneous" under the facts shown on the record. F.R.C.P. 52(a). If, as will be shown below, the Court's ruling was clearly erroneous, it should be reversible. Many of the findings in this case were clearly wrong and the summary affirmance only exacerbates this situation under due process analysis. As this Court has held, we are fairly free to examine the factual results in a case such as this which involves a summary opinion affirming a Trial Court summary judgment and dismissal based upon documentary evidence when such is under due process scrutiny. See rationale U.S. v. General Motors Corp., 384 U.S. 127, 141-2 (1966); see also Note: 52 St. John's L.Rev. 68, 80-81 (1977).

In order to perform a due process

scrutiny a point by point examination of the opinion must be made. Consequently, the following is an explanation of the problems in the summary opinion of the Court of Appeals. As is made clear, the opinion fails to meet due process standards and upon granting the writ, it must be either reversed or remanded for explanation.

A. The Summary Judgment below was Appealed.

In page two of the Court of Appeal's Summary Opinion, the Court states, erroneously, that the Summary Judgment and Dismissal of the Original Complaint below were not appealed. This is patently untrue.

The FDIC contends, somewhat strangely, that Farr did not appeal from the December 6 omnibus order of the Trial Court which dismissed all of Plaintiff's pending requests for review of the Summary Judgment and the Motion to Replead as well as

granting the FDIC's Motion to Dismiss on the remaining issue about which repleading had been permitted. They maintain that this does not constitute complaint about the Summary Judgment. Pray then, what does? As has been made abundantly clear in the notice of appeal and the subsequent acts of all concerned, that is precisely what was meant. It appears that the FDIC is attempting to not say this but rather is stating that the denial of the Motion for New Trial will mean a narrower standard of review based upon abuse of discretion. It therefore appears that appeal was perfected on this point, but that FDIC wishes to only make a point about review. In the instance of a Motion for Summary Judgment however, it is quite clear what the standards of review should be and the issue of abuse of discretion alone is not really relevant. In this case the alleged facts are generally agreed and the

issues of law are fairly well defined. The Trial Court simply erred in not granting the Motion for New Trial based upon the granting of Summary Judgment. If that was not clear to the FDIC, the Ground of Error No. 2 in Farr's Brief (p.vi.) stated this in so many words (e.g. The Trial Court Erred in Granting Defendant's Motion for Summary Judgment.)

Appellant is at a loss to understand why the Court of Appeals ratified the action of the Trial Court without comment. Even assuming, arguendo, that the language on taking the appeal was unclear (there must be some reason for this action by the Court, although Appellant cannot determine what from the summary opinion) the consistent action of the parties must make it clear that such has been the case. It is a commonplace that the Court should look at the reality of the pleadings if any such

confusion has arisen and such cursory examination will reveal that such questions were raised at the appropriate time. Appellant is at a loss to understand the Court's rationale in finding the initial decision unchallenged. The Court also notes, however, that an appeal was filed from the Denial of Motion to Reconsider and New Trial and granting the Dismissal of the Third Amended Complaint. This is, of course, correct, but Appellant is unable to determine if this distinction made any bearing on the Court's decision and is unable, thereby, to analyze the decision to determine his rights upon review.

B. Appellant followed the Trial Court's directive relative to the Third Amended Complaint and did not merely restate all former claims.

The Trial Court granted leave to amend under the provisions of §73.003 of the Texas Property Code relating to the safekeeping of

escheated property. This cause of action was one to be pursued by persons under the protective ambit of the statute. (See Appendix F, pp. 2-3, 11-13, 14-20). Appellant simply filed an action as a person aggrieved by the failure of the Bank to follow the requirements of the statute. The Court seems surprised that the Appellant merely pursued all claims possible under this avenue of recovery. What claims, since he was permitted to file, could he or could he not file? The Court's summary opinion merely states that he refiled the dismissed claims. This is patently untrue. These claims were filed based upon an implied general cause of action arising on behalf of those aggrieved by a statute. This is a well established principle of Texas law. Litton Indus. Products, Inc. v. Gammage, 644 S.W.2d 170, 176 (Tex. Civ. App - Houston, 14th Dist. 1982), citing, Texas and

Pacific Rwy. v. Rigsby, 241 U.S. 33 (1906). Why would Mr. Farr (Appellant) not have the right to raise his claims under this statute? What causes could he not pursue? If the Court proposes to limit this state right, the summary opinion gives no guidance as to why this principle of Texas law is being dismissed.

C. An implied cause of action for violation of a statute exists in Texas.

In pp. 2-3 of its opinion of May 25, 1990, the Court of Appeals justified the dismissal of the Third Amended Complaint by the Trial Court based upon the assertion that the Texas escheat statutes do not provide a private cause of action. §73 Texas Property Code. This is entirely misconstruing the Texas law. As cited in Litton above, when a statute is violated, ". . . and where it results in damage to one of the class for whose especial benefit the

statute was enacted, the right to recover the damages from the party in default is implied." Litton at 176.

The Court has, thus, misconstrued the Texas law and turned it on its head! The law of Texas implies an action in such cases by a protected party. Obviously, with its provisions for the protection of the state and the owners of abandoned property, Mr. Farr is a protected party. Tex. Prop. Code §73.304(d). How can the Court, then, rule that his claim was dismissed because no private cause was provided by statute? No such provision was necessary in Texas. Under Texas law, Mr. Farr was entitled to pursue a claim for failure to comply with this statute and such claim could encompass whatever wrongs were done to him under the four-year statute of limitations.

It should also be noted that the Bank has also violated Art. 349-906 Tex. Rev.

Civ. Stats., through which it seeks protection under same. The statute provides a duty for the preservation and sequestration of goods seized by the Bank under its lien. This failure to follow yet another statute only serves to underscore that Mr. Farr is a protected person under these statutes and shows that the exculpatory clause in the Box rental contract was superceded by other actions which imposed obligations upon the Bank.

The Court has clearly erred and such disruption of Texas precedent must be reconsidered. Has the Court ruled that the Texas right does not exist or does not in this case or some cases? The Opinion gives Appellant no clue as to this ruling yet the diminution of a state cause of action should be explained and noted. Northcross, op.cit.; 63 Cornell L.Rev. at 139.

D. The Court's Opinion does not explain the issues with regards to the Two Year Statute of Limitations in Tort.

On page two of the Opinion the Court dismisses the Appellant's Tort claims by noting that the loss was discovered in May, 1980 and suit was filed in January, 1983. The Court then notes, "Obviously, any tort remedies were barred by the Texas two-year statute of limitations." Absent alia, that might be true, but the Court dismisses all the issues raised by pleading, affidavit and briefing (e.g., Appendix F, pp. 6-7). In those documents Mr. Farr has raised facts and issues sufficient to justify an issue relating to tolling of the statute. As such, the Trial Court was incorrect to grant summary judgment and to dismiss same as was the Court of Appeals in merely making assertions that "obviously" any remedies were barred. If the issues mentioned above were in play how could any remedies be

obviously" barred? This was a great misstatement of the case and the issues before the Court and the Court erred in its global disregard of these matters and its cryptic statement that these remedies were "obviously" barred is amazing. The ruling is either unclear to the point of denial of due process by precluding analysis and review or it is clearly erroneous. U.S. General Motors Corp, op. cit., 52 St. John's L.Rev. op. cit.

E. The Exculpatory clause in the Box Rental Contract does not relieve the Bank of contractual liability and numerous authorities exist to support such liability.

Nowhere is a review and explanation more necessary than upon this point. First of all, Appellant is at a loss to understand the portion of the Opinion on page 2 where the Court states that no reasons or authorities have been forthcoming that would

suggest why the exculpatory clause 6 in the Box Rental Contract should not apply. Petitioner's Lodging, p. 1. This is not true. Appellant discussed this theory at length in previous briefing. (e.g. Appendix F, pp. 2-9). The Court does not state that these are not persuasive, it merely states that no reason or authority has been given. Again, this is untrue, and patently so. The Court seems to focus on the exculpatory clause 6 (see Petitioner's Lodging, p.1). In doing so, it ignores both the language of that clause and the balance of the contract. It is a commonplace that any contract, especially a form contract, Allright, Inc. v. Elledge; 515 S.W.2d 266 (Tex. 1974) should be construed against its maker. Republic Nat'l Bank vs. Northwest Nat'l Bank, 578 S.W.2d 109 (Tex. 1978); General Corrosion Services Corp. v. K Way Equip. Co., 631 S.W.2d 578 (Tex. Civ. App. -

Tyler, 1982). This rule is even more emphatic when the clause to be examined involves an attempt by the maker to excuse itself from liability (as in our case). General Corrosion Services, at 580. For several reasons, it is clear that the exculpatory clause did not apply. Clause six states: "Lessor shall not be responsible for loss of or damage to the contents of any box caused by burglary, theft, embezzlement, fire, flood or disappearance or destruction of contents or any part thereof." It must be remembered that this contract is for rental of a safety deposit box in a vault, etc. Nonetheless, in our case the Bank went beyond this contemplated situation several times. First of all, the Bank, despite forbidding such in the contract (clause 7) had actual control of the Box by holding all the keys during a collateralization of its contents. This shows the boiler plate

nature of the contract, Allright, op. cit.) and also shows that it was regularly superceded since no one has questioned the liability of the Bank when holding bailed goods for collateral. Wallace v. Central State Bank, 270 S.W. 931 (Tex. Civ. App. - Dallas, 1925). Interpretation of the exculpatory language most closely also leads to the conclusion that it only applies to the rented box space when the goods are within it. When the goods are removed by the Bank under another contractual clause, the relief from liability for the "box" must terminate. See analysis, Shell Chemical Corporation v. Owl Transfer Co. 344, P.2d 108,113 (Cal. App. 1959). This interpretation is made even more cogent, as mentioned above briefing, by the provisions of the contract and statutory law. Clause 11 provides for a lien on the property in the box in the event of nonpayment of rent

(as here). When the Bank removed the property from the box for its own purposes and pursuant to a contract clause which allows the entry, the exculpatory clause must be considered superceded under Texas law. Furthermore, the Bank was required to handle the property in a specific way under the two Texas statutes - which it failed to do. Under 342-906 Tex. Rev. Civ. Stats. the Bank is required ("shall") to inventory, bag and seal the property so it may be subsequently sold (if necessary). This was not done and this is the procedure called for under a lien pursuant to clause 11 of the contract - the Bank again breached its security commitments inherent in the contract - and contemplated by the parties when it was made. Again, it breached the provisions of the Escheat Act (Tex. Prop. Code §73), assuming, arguendo, that this property was abandoned, when it failed

("shall") to inventory and hold this property for the state or the owner. We have no inventory and the property was obviously not held! Since the Bank was holding the property under the lien as security for the rental debt, it was a bailee and was liable for failure to deliver the goods upon the payment of the debt. Wallace, op. cit. The Box Rental Contract does not "clearly" place the risk of loss on appellant (as has been pointed out above and before). The Court has no reason to state there is "no reason or authority" why that provision is not binding. The Opinion, is again defective since it shows either a conclusion reached through reasoning not shown or inexplicable in the face of the case or which is absolutely wrong. In either case, Certiorari should issue to either correct the result or request an explanation.

F. The collateral agreement was not complete in 1972.

In its Opinion, on page three, the Court seems to blithely follow the erroneous reasoning of the Trial Court, in that explanation concerning the return of the keys to the Box to Mr. Farr upon the repayment of the loans upon which the first period of collateralization was based. During Mr. Farr's time out of the country in Southeast Asia, the Bank kept both keys to the box and returned them to Mr. Farr several years later by mail. Only the keys were returned to Mr. Farr, yet the Court has ruled that this was redelivery of the goods when it has always been clear that no goods were ever redelivered to Mr. Farr. For all Mr. Farr knows, the keys which were kept in the Bank officer's desk could have been used to remove his coins at that time. Redelivery was never accomplished in 1972, possibly only control. Evidence is

undisputed that no one made an authorized entry into the box until 1980 - when the coins were gone. To rule that merely mailing back keys which had not been kept secured constitutes redelivery is amazing. If you negligently allow your friend's car to be stolen and merely return the keys, that does not constitute redelivery. Mr. Farr discovered this breach of the contract in 1980 and has brought the action accordingly.

This holding of the coins as collateral created a bailment/trustee situation. Wallace op. cit. This also serves to underscore both the contractual duty to return the collateral and the fact that the Box Rental Agreement must be strictly interpreted against the Bank in this case where it conflicts with the actual situation between these parties - the Court seems to have ignored the guide to interpretation

provided by Clause 7 of the Agreement which provided that the Bank was never to have possession (except as specified elsewhere). Under the stingent interpretation shown necessary above, we must then presume that the Bank's possession changes the circumstances, and, hence, again supercedes the blanket exception from liability.

If, as shown above, Mr. Farr was not redelivered his bailed collateral in 1980 the Bank has even more problems. If the Bank is unable to explain or show what has happened, then Mr. Farr recovers. e.g. I.C.C. Metals, Inc. v. Municipal Warehouse Co., 409 N.E.2d 840, 854-6 (N.Y. 1980); Firemans Fund Am. Ins. Co. v. Capt. Fowler's Marina, Inc., 343 F.Supp. 347, 350 (D. Mass. 1971); see also, Banque Canadienne Nationale v. Mastracchio, (1962) S.C.R. 53. If we then presume, as indicated, that the Bank has "misplaced" the goods, they should

be equitably estopped from raising defenses such as laches or limitations.

The Court of Appeals has, again, grossly mistated the facts in this case and review is necessary since the bailment of collateral and the Bank's failure to redeliver should still be before the Court. The Opinions (Trial and Appellate) totally disregard the facts and issues raised without explanation. Without explanation they must fail on inspection since they are clearly wrong. F.R.C.P. 52(a).

G. There were no "unwritten" agreements between Appellant and the Bank.

Appellant admits to being completely confused by the one paragraph ruling on page 3 of the Court of Appeal's opinion that dismissed his case based upon alleged unwritten agreements, citing D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). First of all, the rulings of the Trial Court below were never based on D'Oench. Secondly, the

FDIC never appealed on this issue and if the case is to now turn on this issue, Appellant would like a proper opportunity to respond to this "wild hare" and requested same in his Motion for Rehearing. Thirdly, what are the "alleged unwritten agreements?" Since none of this was a proper issue before, Appellant would like to know what falls under this statement. The Court of Appeal's Opinion does not help in the least, nor does previous briefing. The Trial Court did not find any D'Oench situations. In fact, an examination of the issues before the Court indicates that there was no D'Oench hidden agreement anywhere. The only mention of D'Oench arose from "canned briefing" submitted by the attorneys for the FDIC, who also cited unpublished opinions in support, further enhancing the policy discussions shown above. This case is being victimized by being put in a stream of cases in which

it does not belong and which deserve full due process consideration rather than cursory dismissal. When the FDIC took over the Bank, this case was already on file and on the books of the Bank. Appellant is not trying to avoid liability on some obligation to the Bank based upon some previous agreements, course of dealing, etc. This is a fairly simple case involving contract and failure to deliver bailed goods. None of the policy reasons underlying D'Oench apply, even if we had been talking about it. Note: 63 S.Cal.L.Rev. 255 (1988). If the Court of Appeals wished to determine whether D'Oench applies, it would seem better to have so indicated and allowed all parties proper opportunity to both determine the concerns of the Court (impossible from the two sentences in the opinion) and opportunity to be heard on the subject. Boddie v. Connecticut, 401 U.S. 371 (1971). The

Court's Opinion does neither and review is obviously necessary.

CONCLUSION

For the reasons cited above, Petitioner requests the Honorable Supreme Court review the decision of June 26, 1990, of the Court of Appeals, Fifth Circuit, affirming the Trial Court and to issue a Writ of Certiorari reviewing the Opinion of the Court of Appeals and its failure to grant a Rehearing in this matter or to issue a Writ remanding this matter to the Court of Appeals for a full and fair hearing and delivery of a reasoned opinion.

Respectfully submitted,

Walter W. Leonard
ATTORNEYS FOR PETITIONER
1300 Summit Ave., Suite 504
Fort Worth, TX 76102
(817) 335-6538

DATED: November 14th, 1990.

NO. _____

IN THE SUPREME COURT OF THE
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RESPONDENT

PROOF OF SERVICE

I, WALTER W. LEONARD, do swear or declare that on this date, November 14th, 1990, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid:

The names and addresses of those to be served are as follows:

Mr. Randall Betty
400 River Run Plaza Tower
1701 River Run Road
Fort Worth, TX 76107
(817) 336-7285

Mr. William Carroll 3 copies
500 Trammell Crow Center
2001 Ross Ave.
Dallas, TX 75201-2916
(214) 220-8569

Solicitor General 3 copies
Department of Justice
Washington, D.C. 20530

Walter W. Leonard

Subscribed and sworn to before me on this the 14th day of November, 1990.

Marie McDonald Barr
Notary Public in and
for the State of Texas

My Commission Expires:

1/30/93

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 90-1012
Summary Calendar

F. L. FARR,
Plaintiff-Appellant,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,
Defendant-Appellees.

Appeal from the United States District Court for the Northern District of Texas
CA4-88-559-E

May 25, 1990

Before WILLIAMS, JOLLY and DUHE', Circuit Judges.

PER CURIAM:1

Appellant, the renter of a bank safety deposit box, sued the bank in tort and breach of contract for alleged disappearance of items from the rented safety deposit box. The bank failed and the FDIC was substituted. The FDIC filed a Motion for

Summary Judgment seeking dismissal of the tort claims as prescribed and dismissal of the contract claim on the basis of a provision of the rental contract placing the risk of loss on appellant. Appellant sought leave to amend with a complaint which restated all of the prior claims and added a claim under Tex. Prop. Code Ann. §73.003 (Vernon 1984), (the bank escheat statute) as well as new negligence and res ipsa loquitur claims. The district court granted appellee's Motion for Summary Judgment and dismissed all claims in the original and second amended complaint but allowed appellant to amend a state claim under §73.003 and, contrary to the district court's unappealed order, restated all the previous claims which had been dismissed. Appellant then filed a Motion to Reconsider and Motion for New Trial. Appellee filed a Motion to Dismiss this third amended

complaint. The district court denied the Motion to Reconsider and for New Trial and granted the Motion to Dismiss the third amended complaint. It is this judgment which is appealed.

For the reasons set forth in the district court's orders filed September 25, 1989 (Record page 240 et seq.) and December 6, 1989 (Record page 412) and the following additional reasons, we affirm.

The safety deposit box was rented in December 1969. The alleged loss was discovered May 22, 1980. Suit was filed on January 10, 1983. Obviously, any tort remedies were barred by the Texas two-year statute of limitations. Tex. Civ. Prop. Rem. Code §16.003(a) (Vernon 1986). Appellant's contention that the four-year limitations period of §16.004 applies because his claim is really under the escheat statutes is without merit. He

overlooks the fact that Texas escheat statutes do not provide a private cause of action. Tex. Prop. Code Ann. §73.003 (Vernon 1984) et seq. this is also the reason why the district court properly dismissed his third amended complaint.

Appellant's contract claims are likewise without merit. The safety deposit box rental contract clearly places the risk of loss on appellant. He points to no reason or authority why that provision of that contract is not binding.

He claims the bank also had an obligation of safekeeping pursuant to a pledge agreement executed by him in connection with a loan. Assuming that the pledged collateral indeed included the missing property the pledge agreement has expired by complete performance in 1972.

Finally, appellant makes claims based on alleged unwritten agreements between

himself and the bank. Such agreements, event if they existed, would not bind the FDIC. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S. Ct. 676, 86 L.Ed. 956 (1942).

The judgment appealed from is AFFIRMED.

1 Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

F. L. FARR	§	
	§	
VS.	§	Civil Action No.
	§	4-88-559-E
FEDERAL DEPOSIT	§	
INSURANCE CORPORATION	§	
ET AL.	§	

ORDER

The Court now considers defendant's motion for summary judgment and plaintiff's motion for leave to amend complaint. After thorough review of the motions, supporting proof and applicable law, the Court makes the following determination.

FACTUAL BACKGROUND

Plaintiff's complaint alleges the following series of events which underlie this litigation. On December 31, 1969, Farr rented a safe deposit box from the defendant, RepublicBank Fort Worth (Republic), at which time he entered into a contract with Republic for the rental of the

box. On May 22, 1980, Farr returned to the box to examine the contents, whereupon he discovered that the box had been drilled open and its contents removed to a separate locker because Farr had notpaid his rental fees for some time. Farr alleges that several coins were missing from the box and that there were coins persent which had been minted subsequent to the last time Farr had opened the box in 1969.

Farr is suing Republic for breach of contract and conversion and seeks leave of Court to amend his complaint to add claims of negligence and a violation of §73 of the Texas Property Code.

I. Motion for Summary Judgment. The Court will consider the motion for summary judgment before determining whether the motion to amend should be granted. As the case now stands, it is an action in contract and for conversion of property. The terms

of the contract entered into by the parties in 1969 determines the obligations of the parties with respect to the rental of the safe deposit box.1 The contract provides as follows:

> 6. Lessor [Republic] shall not be responsible for loss of or damage to the contents of any box caused by burglary, theft, embezzlement, fire, flood or disappearance or destruction of contents or any part thereof. The entire risk of such loss, destruction, disappearance, or damage being assumed entirely by Lessee [Farr].

Thus, under the terms of the contract, Farr assumed all risk of loss of the contents in the box. There is no evidence that the contract should not apply. Therefore, Farr is bound by the terms of the contract, under which he assumed all risk of loss of the contents of the box. Because there is no evidence of a breach of the contract, summary judgment is granted on this cause of action.

Farr's second cause of action is based on the alleged conversion of the propety in the box as pledged collateral on a loan with the bank. The law implies a duty in the pledgee of collateral not to deplete the value of the collateral intentionally. Empire Life Ins. Co. v. Valdak Corp., 468 F.2d 330 (5th Cir. 1972). Defendants argue that the coins in the safe deposit box were not the same coins pledged as collateral on the note. However, Farr has produced a note payable to the bank which lists as collateral a "coin collection," without further specification. The Court finds that there is a genuine issue of fact as to whether the coins left in the safe deposit box are the same coins pledged as collateral on the loans.

Defendant also argues that the statute of limitations bars suit. Because the Court has granted summary jdugment on the breach of contract claim, it need only consider the

limitation period of the conversion claim. Farr characterizes his conversion claim as one for beach of contract of the security agreement. However, the claim is actually one in tort for intentional fraud in the conversion of the property. The nature of the damages is not in contract, but in tort. There are no damages stemming from the contract which was terminated by complete performance in 1972. The alleged wrongful conduct was not discovered until May 22, 1980, and the damages sought are for the value of the coins. As the claim is based in tort -- the conversion of personal property -- the two-year statute of limitations period applies. Tex. Civ. Prac. & Rem. Code §16.003. Plaintiff did not file this suit until January 10, 1983, over two years after the discovery of the alleged fraud. Accordingly, the motion for summary judgment is granted on the claim for

conversion.

Because all of the plaintiff's causes of action have been dismissed, his claim for attorneys' fees and pre-judgment interest must also be dismissed.

II. Motion to Amend. Farr seeks to add to new claims of negligence and a violation under §73.003 of the Texas Property Code, in addition to the claims asserted above. Although leave to amend shall be freely given, the Court has discretion to deny leave where it would be futile.2 The amendment would certainly be futile as to the claims for conversion and for breach of contract. The Court further finds that an amendment would be futile to add a claim for negligence, as it would also be barred by the two-year statute of limitations.

The Court reluctantly grants plaintiff's to amend to add his claim under §73.003 of the Texas Property Code.

Plaintiff is admonished that any further motions to amend at this late date will be looked upon with extreme skepticism.

III. Conclusion. For the above stated reasons, defendant's motion for summary judgment is hereby GRANTED in its entirety.

Plaintiff's motion to amend is GRANTED in part and DENIED in part. Plaintiff's amended complaint shall contain only one cause of action under §73.003 of the Texas Property Code, and shall be filed within 10 days of the signing of this Order.

SIGNED this the 22nd day of September, 1989.

ELDON B. MAHON
U.S. District Judge

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1. In the absence of a contract to the contrary, Art. 342-906, Texas Revised Civil Statutes Annotated defines the relationship between a bank maintaining safety deposit boxes and the renter as that of lessor and lessee. Although the contract is not inconsistent with the statute, it controls the rights and obligations of the parties in this case.

2. See Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc. 690 F.2d 1157 (5th Cir. 1982).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

F. L. FARR	§	
	§	
VS.	§	Civil Action No.
	§	4-88-559-E
FEDERAL DEPOSIT	§	
INSURANCE CORPORATION	§	
ET AL.	§	

ORDER

The Court now considers plaintiff's motion to reconsider and motion for new trial, defendant's motion to dismiss, and plaintiff's motio for continuance. After thorough review of the motions, record and applicable law, the Court makes the following determination.

The Court has reviewed its order of September 25, 1989, and determines that it is in all things correct. Accoridngly, plaintiff's motion to reconsider is hereby DENIED.

In the Court's Order of September 25, 1989, granting summary judgment, the Court

also allowed plaintiff to amend his complaint to assert a claim under §73.003 of the Texas Property Code. Defendant has filed a motion to dismiss this one remaining claim for failure to state a claim under which relief can be granted. Fed. R. Civ. P. 12(b)(6). Chapter 73 of the Texas Property Code is entitled "Escheat of Inactive Accounts Held by Banking Organizations." The statute provides an action to the state for the reversion of property. However, the statute does not provide a private cause of action. Moreover, the statute expressly states that it does not affect the provisions of Article 6, Chapter IX, the Texas Banking Code of 1943 (Article 342-906, Vernon's Texas Civil Statutes). Accordingly, defendant's motion to dismiss is hereby GRANTED.

As all causes of action have been disposed of, plaintiff's motion for

continuance is MOOT.

Signed this the 5th day of December, 1989.

ELDON B. MAHON
U.S. DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-1012

F. L. FARR,
Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORP., ET AL.,
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING
(June 26, 1990)

Before WILLIAMS, JOLLY and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the Petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX D

AMEDMENT V - GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actaul service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-1012

F. L. FARR,

PLAINTIFF - APPELLANT

VS.

FEDERAL DEPOSIT INSURANCE
CORPORATION, ET AL..

DEFENDANT - APPELLEE

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF TEXAS

BRIEF FOR APPELLANT

WALTER W. LEONARD
State Bar No.: 12211300

Attorneys for Appellant
LEONARD & JONES
1300 Summit Avenue
Suite 504
Fort Worth, TX 76102
(817) 335-6538

APPENDIX F

B. ARGUMENT. The Bank relies on Article 342-906 Tex. Rev. Civ. Stats. for comfort that this situation is only that of lessor/lesee and they are not responsible for whatever happened. This is obviously wrong. Both the statute and the agreement do not apply to these circumstances. Both contemplate only the simple situation where someone leaves its items in a box and then suffers a loss, discovered upon opening the box without any intervening action by the Bank. In this case, the Bank had sole access and control of the box several times for lengthy periods. Periods in which they even admitted their control was slipshod (Record p. 176-177, Appendix p. 57-58). By the terms of the Bank's own agreement, in Section 7 of the Box Rental Contract (Record p. 11, Appendix

P. 10) the Bank specifically foreswears any access to the Box by forbidding itself any key or combination (i.e. access to the Box). Thus, and reasonably, the Bank is to be insulated from liability in circumstances in which it does not participate in the management of the Box. Article 342-906 (insofar as it applies here) gives Defendant no comfort. This is only in the event of no contract to the contrary and also clearly contemplates circumstances in which the Bank may have to take possession of the Box to satisfy a lien - in which case the Bank is in possession and must exercise due and reasonable care of the property it is holding for its own purposes. In our circumstances the provisions of absolution under the rental agreement and Article 342-906 have both been

superceded.

In this case, as is shown in Plaintiff's affidavit, the Bank had sole access for several years during the term of a loan for which the coins were collateral and the keys were also entrusted to Mr. McCalmont by Mr. Farr since he was going out of the country. (Farr deposition, Record p. 102-103, Appendix p. 39-40). The Bank had sole access to the keys to the box during this period in contravention of the circumstances envisioned in Article 342-906 and in supercession of the Box Rental Agreement nor do we have an accounting of the security, or lack of same, given to these keys. For most of this time, this was also pursuant to the bailment to the Bank as collateral under the written loan and collateral agreement (it should be noted that, if

the coins were misdelivered or lost during this period the discovery of the loss occurred in May, 1980). This period of sole access, and any subsequent periods of sole access, clearly impose upon the Bank the duty to care for the coins as either bailed collateral or as property held in satisfaction of a lien. Both these tenures are impliedly or directly part of the written contracts for collateralization and box rental respectively. The Bank must not be able to hide behind these provisions which clearly do not apply to the situation they propose.

The Court erred in granting summary judgment that the Bank did not breach contractual duties in Mr. Farr in several respects. The Defendants and the Court have focused wrongly on

the exculptary clause number 6 in the Box Rental Contract. (Record p. 11, Appendix p. 10). This clause has clearly been superceded by the actions of the Bank itself. First of all, the provisions of Section 6 clearly only pertain to a normal tenure, this present case is one in which the Bank, under the provisions of other contractual agreements, had control of the box and its contents not once, but twice. First of all, as the Bank's own records have shown (Farr deposition, Record p. 169-172, Appendix p. 50-53) and has been shown by affidavit and testimony, (Farr Affidavits, Record p. 301-308, Appendix p. 118-125; Record p. 175, 179, Appendix p. 56, 60; Farr deposition, Record p. 169-172, Appendix p. 50-53) the Bank was the only party with access to the box

during Mr. Farr's time out of the country - both in Southeast Asia and Canada - no one else ever entered the box after 1969 and the Bank had the keys granting it sole access during that time. This retainage of control by the Bank is a violation of Section 7 of the Agreement which provides that Lessor shall retain no key or combination of any lease box. This clause alone shows that we must look beyond the "boiler-plate" language of Clause 6 cited by the Bank and Court. Furthermore, Section 5 provides further indication that our case is governed by other clauses in this contract. Section 5 provides that "No person other than the Lessor or his designated deputy or his legal representative shall have acces to the box, except as provided for herein." Obviously, the Bank by keeping the keys and restricting access to the box as part of the collateralization agreement and in seizing

the box for rent, took access to the box. Clause 6 cannot release the box from the contractual and statutory, obligations it incurred by stepping outside the normal circumstances envisioned in Clause 6. State law, as mentioned infra, imposes strict guidelines on the entry into boxes by the Bank, and furthermore, our contract envisions the Bank taking possession under certain circumstances. In our circumstances, the Bank took possession of the box under the provisions of Section 11, which provides for a lien on the contents. When the Bank took possession of this property it was assumed a position of trust as holder of Mr. Farr's property under the provisions of the statute as well as under conventional contract law. Since the loss to the box has occurred while the Bank had possession under either or both of the periods in which it had possession of the

property under the provisions of contactual agreements, it must not now be allowed to invoke a superceded clause to its protection.

The Court is incorrect to characterize the loss as only a conversion. If, as has been shown above, the loss was the brach of a contractual agreement then the loss was not only arguably also conversion, but contractual. For purposes of a summary judgment we must now, apparently, presume that there was no loss during the collateralization. There has been an unexplained loss and the Bank had sole access to the box. For a summary judgment to be granted, the Bank must be clearly not liable since there is no indication that the property was returned, only the keys. (Farr deposition, Record p. 169-172, Appendix p. 50-53; Farr Affidavit, Record p. 175-179, Appendix p. 56-60; Record p. 304,) (C.A.

The Court erroneously granted Summary Judgment on this basis.

The present case also falls within two year statute with regards to the conversion action. As shown in Mr. Farr's affidavit, and has been shown in previous pleadings and testimony, Mr. Farr only discovered that there might be a problem in the Spring of 1980 (Record p. 175-178, Appendix p. 56-59). At that time, he told the Bank that some coins appeared to be missing and the Bank's officials indicated that they would check to see what had happened, where the coins were, etc. Mr. Farr agreed to furnish a list of these losses, and did so. On that basis, Mr. Farr returned home to Canada and intermittently attempted to contact Mr. Wilde - who was in charge of the search. Mr. Wilde would not return Mr. Farr's calls. Finally, in 1982, frustrated and worried Mr. Farr contacted Mr. Lunt and was told that

nothing had been found, but was shown a letter by Mr. Lunt to the Bank's attorneys which indicated the ongoing search, as Mr. Lunt also indicated in his transmittal letter to Mr. Farr. At this time, Mr. Farr felt he had reason to believe that there would be no easy solution and that the coins were indeed lost (Record p. 301-308, Appendix p. 118-125). He contacted the FBI and sought legal assistance. The two year statute for the conversion of the coins had not run. The actions of the Bank in misleading Mr. Farr to believe that there would be a solution or that the coins would be found has tolled the statute. Mr. Farr reasonably relied on the indications that an explanation would be forthcoming and the Bank, two years later, continued to temporize and did not indicate the status of the coins. Brooks Fashion Stores v. Northpark National Bank, 689 S.W.2d 937,

944-5 (Tex. App. 5th Dist., 1985).

The Bank has also found itself indebted to Mr. Farr for the loss of these coins under the provisions of §73 of the Tex. Prop. Code (Record p. 288, Appendix p. 105). In this case the Bank is obviously a depository under the terms of this act and the facts raised by Plaintiff in his affidavit (Record p. 175-178, Appendix p. 56-59; Record p. 301-302, Appendix p. 118-119) show that the box was inactive since rent was more than one year in arrears and there had been no legitimate activity in the box for more than 10 years. Under the provisions of §73.003 the Bank is under an active duty to protect the property (besides the duty to protect liened property) and to not reduce, convert, etc., the contents of the box to its own advantage e.g. seized or stored for back rent. The contents of this inactive box were missing and the Bank

having taken affirmative, and negligent control (see Plaintiff's affidavit, Record p. 175-178, Appendix p. 56-59) of the box is liable for this loss since it had seized the box for nonpayment of debt for the value of the contents of the box. McGuire v. Baker; 412 F.2d 985 (C.A. Tex. 1970); cert. den. 400 U.S. 820 (1970).

For the reasons stated above, the Court's Summary Judgment that the Plaintiff's claim for attorney's fees and prejudgment interest were not allowed were in error. Art. 2222 Tex. Rev. Civ. Stat. provides for reasonable attorney's fees in cases involving recoveries under contract. As shown above, recovery under contract is clearly indicated in this case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-1012

F. L. FARR,

PLAINTIFF - APPELLANT

VS.

FEDERAL DEPOSIT INSURANCE
CORPORATION, ET AL..

DEFENDANT - APPELLEE

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF TEXAS

REPLY BRIEF FOR APPELLANT

WALTER W. LEONARD
State Bar No.: 12211300

Attorneys for Appellant
LEONARD & JONES
1300 Summit Avenue
Suite 504
Fort Worth, TX 76102
(817) 335-6538

distinguishing between the two is hardly the sin of "artful pleading". The Trial Court wholly erred when it failed to recognize this duality. Mr. Farr has always underscored the reasoning of "look to the remedy" of King by asking first and foremost for the return of his coins or duplicates thereof. This would be only asking for the contractual return of the secured property.

The Court also erred in granting the Motion to Dismiss based upon the supposed inapplicability of §73-4 of the Texas Property Code. The four year statute of limitations provided thereby does apply and Mr. Farr is a beneficiary of that statute and may bring actions to recover under same. First of all, Mr. Farr is a beneficiary of the provisions cited in that Texas

Property Code. Section 74.501 et. f.f. provides for the claims of people whose property has been held as inactive by the Bank - whether it has yet been turned over or not. As we have show in pleadings, affidavit and previous briefing (e.g. Appellant's Brief p. 17) this was an inactive box that the Bank had seized. As such, its contents fell under the Aegis of the Statute. Interestingly for us, the Bank was merrily ignoring the statute and proceeding under the lien provisions of the box rental contract - thus violating state law and abrogating the usual statute scheme. The Bank has here frustrated the statutory scheme. It has seized inactive property within the statute and not turned it over to the state and it has (we must presume so for a Motion

to Dismiss and Summary Judgment, since Plaintiff has stated so in his proceedings and affidavits) failed to preserve the secured property. Mr. Farr, as a beneficiary of the statute, pursuant to Litton Indus. Prod. v. Gammage, 644 S.W.2d 170, 176 (Tex. App. - Houston [14th Dist.] 1982), rev'd in part on other grounds, 688 S.W.2d 319 (Tex. 1984), may bring this action even under the analysis of the FDIC. Clearly this is a situation not within the normal chain of events under this statute, especially since the Bank has created the mess and the irregularities. If Mr. Farr is, therefore, able to bring this action he must be able to pursue whether remedies are applicable - if these include tort, contract, standards such as res ipsa, then they must include them.

The FDIC likewise receives no comfort from §73.003 (relating to Art. 342-906 Texas Revised Civil Statutes.) As we have shown in our earlier briefing (Appellant's Brief, p. 11), 342-906 does not apply - again because of the Bank's actions. This is an exculpatory statute for ordinary box rental contract situations. As we have shown many times, the Bank moved far beyond this situation when it had sole control and possession of these secured properties on two occasions when it assumed control for its own devices - pursuant to written contracts. Art. 342-906 and §73.003 have been superceded.

The four year period of limitations is again controlling in this case. The Pounds Photographic Labs, Inc. v. Noritsu Am. Corp., 818

F.2d 1219 (5th Cir. 1987) holding that the state provision for a four year statute for statutory liability under a statue applies only when no period is provided by the statute in question. Where §73-4 of the Texas Property Code provide for limitations, they foreswear them (§74.308). Furthermore, we have shown that this case involves a beneficiary of the statute who, because of actions by the Bank, has been forced into a unique position and should therefore qualify for the policy of Pounds by being outside the usual scheme. Additionally, as we have shown above, a four year statute is entirely appropriate since these actions stand as well in contract as tort. The State scheme also envisions as active role by claimants when the Bank has not yet delivered the goods to the State (but,

alas, where it has not lost them), whereby the claimant may sidestep to collection of his property directly. §74.501.